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7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re:) Case No.: 12-55134
12)
13 LOUIS CHARLES ROCHA,) CHAPTER 13
14 Debtors.) **MOTION FOR RELIEF FROM**
15) **AUTOMATIC STAY NUNC PRO TUNC;**
16) **ANNULLING THE STAY NUNC PRO**
17) **TUNC; AND CONFIRMING NO STAY**
18)
19) Date: September 12, 2012
Location: 3:00 p.m.
United States Bankruptcy Court, Rm. 3070
280 South 1st St.
San Jose, CA 95113
Judge: Honorable Charles Novack

20 The Saunders Company, secured creditor, moves this court for relief from stay nunc pro
21 tunc to the petition date pursuant to 11 U.S.C. 105, 362 (d)(1), (2)(A) and (B), 362 (d)(4)(B), and
22 362 (f) of the United States Bankruptcy Code, Rule 4001 of the Federal Rules of Bankruptcy
23 Procedure, and Local Rule 4001-1 of the United States Bankruptcy Court for the Northern District of
24 California; for an order to annul the stay nun pro tunc to the petition date; to confirm that no stay is in
25 effect pursuant to 11 U.S.C. 105 and 362 (c)(3)(A) of the United States Bankruptcy Code all with
26 respect to the Debtor, related property of the estate, and real properties commonly known as: 109
27 Pearl Street, King City, CA (A.P.N. 026-241-002), 304 & 306 S. First Street, King City, CA (A.P.N.
28 026-241-008), 107 Pearl Street, King City, CA (A.P.N. 026-241-009), and 324 S. First Street, King

MOTION FOR RELIEF FROM AUTOMATIC STAY NUNC PRO TUNC; ANNULLING THE STAY NUNC PRO TUNC; AND
CONFIRMING NO STAY

1 City, CA (A.P.N. 026-242-001) (jointly “Real Property”) and a related Deed of Trust recorded on
2 November 29, 2007 (Document# 2007089381) (“Deed of Trust”), a Notice of Trustee Sale recorded
3 on June 18, 2012 (Document# 2012035299), and three Trustee’s Deeds recorded on July 11, 2012
4 (Document#2012040201 for 324 S. First Street, King City, CA (A.P.N. 026-242-001),
5 Document#2012040202 for 109 Pearl Street, King City, CA (A.P.N. 026-241-002), and
6 Document#2012040203 for 107 Pearl Street, King City, CA (A.P.N. 026-241-009)) and pending
7 Unlawful Detainer actions against the Debtor relative to personal property abandoned at (two parcels
8 of) the Real Property; and for a waiver of the provisions of Federal Rules of Bankruptcy Procedure,
9 Rule 4001 (a)(3)¹ as follows:

10 **I. Introduction.**

11 **A. Debtor’s Relationship To The Saunders Company.**

12 On November 20, 2007 The Saunders Company, as lender, and Debtor Louisa C. Rocha²
13 (Debtor) and Gwen S. Rocha, husband and wife as joint tenants, as borrowers, entered into a Note
14 Secured By Deed of Trust Straight Note whereby The Saunders Company loaned the borrowers
15 \$525,000 at 10.5 percent interest with payments of \$4,593.75 due on the 1st of the month beginning
16 on January 1, 2008 and continuing through December 1, 2010³ at which time the unpaid balance,
17 including principal and interest, become due and payable (“Promissory Note”).

18 The Promissory Note was secured by a Deed of Trust And Assignment of Rents recorded with
19 the Monterey County Recorder on November 29, 2007 (Document#2007089381)(“Deed of Trust”)
20 relative to 109 Pearl Street, King City, CA (A.P.N. 026-241-002), 304 & 306 S. First Street, King
21 City, CA (A.P.N. 026-241-008), 107 Pearl Street, King City, CA (A.P.N. 026-241-009), and 324 S.
22 First Street, King City, CA (A.P.N. 026-242-001) (jointly “Real Property”). The Deed of Trust
23 required, among other things, for the borrowers to maintain the property(ies), maintain insurance, and

24
25 ¹All references to recorded documents were recorded with the Monterey County Recorder’s
Office.

26 ²A.k.a. Louis C. Rocha.

27 ³On December 1, 2009 and on December 1, 2010, Modification of Note Agreements were
28 entered into whereby, among other things, the interest rate was reduced to 7.0 percent and the
maturity date was extended to December 1, 2012.

1 pay property taxes.

2 Debtor did not and does not reside at any of the properties that make up the Real
3 Property.

4 **B. Debtor's First Bankruptcy⁴.**

5 On September 23, 2011, Debtor's first Chapter 13 Bankruptcy, In re Louis Rocha, U.S.B.C
6 (ND CA) #11-58862, was filed ("First Bankruptcy"). The First Bankruptcy did not include any
7 reference to The Saunders Company, including on the Creditor Matrix. The First Bankruptcy was
8 dismissed on October 19, 2011 for Debtor's failure to file schedules and failure to comply with the
9 court's order to file schedules.

10 The Saunders Company was not aware of the First Bankruptcy until after the belated notice of
11 the Second Bankruptcy (defined below).

12 **C. Foreclosure on The Real Property and Deed of Trust and Recording of Trustee's**
13 **Deeds.**

14 Subsequent to Debtor's First Bankruptcy and prior to his Second Bankruptcy Debtor did not
15 pay property taxes, required insurance, and the mortgage debt owed to The Saunders Company and
16 failed to maintain the Real Property, while collecting and not turning over rents from the tenants of
17 the Real Property.

18 On March 8, 2012, a Notice of Default was recorded (Document#2012014323).

19 On June 18, 2012 a Notice of Trustee Sale was recorded (Document# 2012035299) calling for
20 a balance owed, as of June 18, 2012, of \$550,678.17.

21 On July 11, 2012, The Saunders Company foreclosed on three of the four properties and three
22 Trustee's Deeds recorded on July 11, 2012 (Document#2012040201 for 324 S. First Street, King
23 City, CA (A.P.N. 026-242-001), Document# 2012040202 for 109 Pearl Street, King City, CA
24 (A.P.N. 026-241-002), and 2012040203 for 107 Pearl Street, King City, CA (A.P.N. 026-241-009)).
25 The Saunders Company did not proceed to sale on 304 & 306 S. First Street, King City, CA (A.P.N.
26

27
28 ⁴The court may take judicial notice of the Debtor's bankruptcy filings (Fed.Rule.Evid. 201).

1 026-241-008). The balance owed on the Promissory Note and Deed of Trust, after deducting the
2 credit bids by The Saunders Company, was, as of July 11, 2012, approximately \$74,326.92
3 (\$549,326.92 owed on July 11, 2012 less credit bids totaling \$475,000). The Saunders Company
4 submits that as of the date of the trustee sale and/or the petition date the real properties that made up
5 the Real Property did not have a combined value equaling the balance owed and none of the
6 properties had a value exceeding the respective credit bid.

7 The Saunders Company understands that at or about July 11, 2012, the outstanding real and
8 personal property taxes on the Real Property was at least \$7,888.38 (\$3,724.49 on 109 Pearl Street,
9 \$1,225.42 on 304 & 306 S. First Street, \$0.00 on 107 Pearl Street⁵, and \$2,938.47 on 324 S. First
10 Street).

11 On and after July 11, 2012, The Saunders Company, with respect to some of the Real Property,
12 collected rents, paid insurance, and incurred maintenance expenses. For example, The Saunders
13 Company paid and continues to pay insurance (\$1,268.31 through August 23, 2012) and repairs and
14 maintenance (\$2,5000 through August 23, 2012) and collected rent (or portions of rent) (\$2,880.00
15 through August 27, 2012).

16 On July 17, 2012, The Saunders Company served tenants at the Real Property 90 day notices to
17 vacate. On August 1, 2012, The Saunders Company entered into rental agreements with these tenants
18 of the Real Property.

19 On August 13, 2012, The Saunders Company commenced Unlawful Detainer actions against
20 the Debtor and Gwen S. Rocha with respect to two of the properties because Debtor and/or Gwen S.
21 Rocha had abandoned personal property (not appearing in Debtor's schedules) on the properties
22 (Monterey County Superior Court Case No.: M119251 relating to 107 Pearl Street, King City, Ca
23 (A.P.N. 026-241-009) and Case No.: M119252 relating to 324 S. 1st Street, King City, CA (A.P.N.
24 026-242-001). On August 16, 2012, Debtor, and Gwen S. Rocha, was served with the Unlawful
25 Detainer actions by sub-service. On or about August 20, 2012, Debtor, and Gwen S. Rocha, field
26

27
28 ⁵The Saunders Company understands these property taxes were paid by a Chase.

1 answers to the two Unlawful Detainer actions admitting the alleged facts and asserting (jointly) a
2 single affirmative defense “Filed Bankruptcy Chapter 13 before plaintiff began there claim.” (sic)

3 **D. Second Bankruptcy-Related Notice To The Saunders Company And Omissions**
4 **From Schedules⁶.**

5 On July 10, 2012, Debtor commenced this second Chapter 13 bankruptcy (“Second
6 Bankruptcy”).

7 Debtor’s Second Bankruptcy, like his First Bankruptcy, was filed in pro per, was filed without
8 any schedules, was filed without any reference to The Saunders Company (or anything associated
9 with The Saunders Company), and was filed without notice to The Saunders Company.

10 On August 6, 2012, Debtor filed an amendment to his Creditor Matrix adding The Saunders
11 Company. On August 17, 2012, The Saunders Company received notice of Debtor’s Chapter 13
12 Bankruptcy via certified mail.

13 On August 23, 2012, Debtor filed his schedules, Creditor Matrix, and Chapter 13 Plan none of
14 which make any reference to The Saunders Company, the Promissory Note, the Deed of Trust, the
15 Real Property, the Trustee’s Deeds, and/or the Unlawful Detainer actions.

16 **E. The stay terminated on August 9, 2012.**

17 Pursuant to 11 U.S.C. 362 (c)(3)(A) the stay terminated on August 9, 2012.

18 **II. The Saunders Company Is Entitled To Relief From The Automatic Stay As To The**
19 **Debtor, The Debtor’s Estate, Or Debtor’s Property And Annuling The Stay Nunc Pro**
20 **Tunc To The Petition Date.**

21 **A. The Saunders Company Is Entitled to Relief from the Automatic Stay.**

22 11 U.S.C. 362 (d) provides, in pertinent part, that:

23 “On request of a party in interest and after notice and a hearing, the court shall grant
24 relief from the stay provided under subsection (a) of this section, such as by terminating,
25 annulling, modifying, or conditioning such stay—

26 (1) for cause, including the lack of adequate protection of an interest in property

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28 ⁶The court may take judicial notice of the Debtor’s bankruptcy filings (Fed.Rule.Evid. 201).

1 of such party in interest;

2 (2) with respect to a stay of an act against property under subsection (a) of this
3 section, if—

4 (A) the debtor does not have an equity in such property; and

5 (B) such property is not necessary to an effective reorganization”

6 In addition, 11 U.S.C. 362 (f) provides, in pertinent part, that:

7 “Upon request of a party in interest, the court, with or without a hearing, shall grant
8 such relief from the stay provided under subsection (a) of this section as is necessary
9 to prevent irreparable damage to the interest of an entity in property, if such interest
10 will suffer such damage before there is an opportunity for notice and a hearing under
11 subsection (d) or (e) of this section.”

12 The Saunders Company submits that it is entitled to relief from stay pursuant to Section 362
13 (d)(1), (2), and (4) and (f) on the grounds that there is a lack of adequate protection for The Saunders
14 Company’s interests, the Debtor does not have any equity in the Real Property, the Real Property is
15 not necessary to an effective reorganization, and The Saunders Company will suffer irreparable
16 damage to its interest in the Real Property if relief is not granted as requested herein. In this regard,
17 The Saunders Company notes Debtor has not paid property taxes, has not maintained insurance, has
18 collected rents but not turned them over to the lender, has not maintained the properties, and has filed
19 two bankruptcies without any reference to The Saunders Company; The Saunders Company
20 foreclosed on some of the real properties, recorded Trustee’s Deeds, and proceeded as owner
21 including commencement of Unlawful Detainer actions against Debtor to address abandoned personal
22 property (not appearing on Debtor’s schedules); and Debtor’s Chapter 13 Plan, relatively consistent
23 with its schedules, does not include any reference to The Saunders Company.

24 **B. The Saunders Company Is Entitled To An Annulment of The Stay And/Or A Finding
25 of Nunc Pro Tunc As of The Petition Date.**

26 The entry of a nunc pro tunc order does not involve the equity jurisdiction of the court as the
27 phrase is merely descriptive of the inherent power of the court to make the records speak the truth—to
28 record that which was actually done, but omitted to be recorded. (W.F. Sebel Co. v. Hessee, 214
F.2d 459, 462 (10th Cir. 1954); See also, In re Kroeger Properties and Development, Inc., 57 B.R.

1 821, 822 (9th Cir. BAP 1985), fn 1. In re Atkins, 69 F.3d 970, 975 (9th Cir. 1995)).

2 Similarly, the court has authority to retroactively annul the stay. (In re Cady, 266 B.R. 172 (9th
3 Cir. B.A.P. 2001), aff'd, 315F.3d 1121 (9th Cir. 2003)). Some of the factors to be considered by the
4 court include, how much notice the creditor had of filing, did debtor assert it as a defense, would the
5 court have lifted stay anyway, and whether the creditor's conduct was egregiousness. (In re National
6 Environmental Waste Corp., 129 F.3d 1052 (9th Cir. 1997), cert denied, 524 U.S. 952, 118 S.Ct.
7 2368, (1998)).

8 The Saunders Company submits that all facts and considerations discussed hereinabove and
9 relating to The Saunders Company's post-petition actions warrant entry of an order nunc pro tunc or
10 annulling the stay retroactively to the petition date.

11 **IV. The Saunders Company Is Entitled To An Order That There is No Stay In This Case**
12 **Relative To The Debtor, The Debtor's Estate, Or The Debtor's Property.**

13 11 U.S.C. 362 (C)(3)(A) provides, in pertinent part, that:

14
15 "the stay under subsection (a) with respect to any action taken with respect
16 to a debt or property securing such debt or with respect to any lease shall
17 terminate with respect to the debtor on the 30th day after the filing of the later case".

18 As a matter of law, the stay has terminated. In In re Reswick (446 B.R. 362 (B.A.P. 9th Cir.
19 2011)), the bankruptcy court adopted the view that pursuant to 11 U.S.C. §362(c)(3)(A) the
20 automatic stay terminated in its entirety on the 30th day after the petition date if the debtor had not
21 asked the court to extend that date.⁷

22 **V. The Saunders Company Is Entitled To A Waiver of Rule 4001.**

23 For the reasons discussed above, The Saunders Company is entitled to a waiver of Federal
24 Rules of Bankruptcy Procedure, Rule 4001.

25 **VI. Conclusion.**

26
27 ⁷Moving party notes there are differing opinions on the scope of the termination of the stay,
28 including conflicting opinions within the Central District of California (In re Rinard, 451 BR 12
- Bankr. Court, CD California (May 9, 2011) and In re Hernandez, 2012 Bankr. LEXIS 1914
(Bankr. C.D. Cal. Jan. 31, 2012)).

1 WHEREFORE, moving party respectfully requests that the court issue an order granting relief
2 from stay by terminating, annulling, modifying, or conditioning the stay as to the Debtor, the Debtor's
3 estate, and the Real Property nun pro tunc as of the petition date, confirming there is not stay with
4 respect to the Debtor, the Debtor's estate, and the Real Property and the Unlawful Detainer actions,
5 waiving the provisions of Federal Rules of Bankruptcy, Rule 4001 (a)(3), and ordering such other and
6 further relief as is just.

7 Dated: August 28, 2012

CAMPEAU GOODSSELL SMITH

8 By: /s William J. Healy
9 William J. Healy